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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 161

LOUIS LARSON and EDWARD JOHNSTONE,

Petitioners,

vs.

GENERAL MOTORS CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement of the Case

This action was brought for breach of a quasi-contract on the theory of unjust enrichment, the complaint alleging that petitioners notified respondent of their idea in concrete form and that thereafter respondent used petitioners' idea without paying them for that use (Vol. A, 7-9).

A special verdict was returned in respondent's favor (Vol. A, 972-3), and judgment was entered thereon (Vol. A, 974). The judgment was affirmed by the Circuit Court of Appeals for the second Circuit (Vol. C, p. 25, following p. 299).

Petitioners have omitted from their petition and brief the questions of the special verdict of the jury and the answers thereto, which are found in Vol. A, 972-3, and are as follows:

> "1. Did the plaintiffs prior to defendant's first use of same conceive and develop an original and novel

idea or plan for the construction of a four-passenger coupe without rumble seats having for its primary purpose the elimination of the rumble seat and the utilization within the body proper of the unused space located between the operator's seat and the back wall for the seating of two additional passengers and the carrying of luggage without the necessity of lengthening the body, which idea or plan required the lengthening of the roof and the widening of the doors in existing coupes.

"NO

"2. Did the defendant for the first time after its receipt of Plaintiffs' Exhibits 2-A and 5-A use plaintiffs' ideas as expressed in said exhibits in the construction of its four-passenger coupes built without rumble seats?

"NO

"3. Do you find as a matter of fact that the defendant, General Motors Corporation, prior to February 8, 1934, devised and made and shipped coupes without rumble seats and containing folding opera or additional seats placed in the space or cabin behind the driver's seat with the doors widened and the roofs lengthened?

"YES

"4. Do you find as a matter of fact that, in 1930, the Derham Body Company, of Rosemont, Pennsylvania, devised, made and shipped coupes without rumble seats and containing folding opera or additional seats placed in the space or cabin behind the driver's seat and with the roofs lengthened and the doors widened?

"YES

"5. Do you find as a matter of fact that patents and publications issued at least as early as 1928 disclosed coupes containing folding opera or additional seats placed in the space behind the driver's seat, with the roofs lengthened and the doors widened?

"YES".

From the above it is seen that, besides the defenses of prior use by a third party (No. 4), and prior patents

and publications (No. 5), which the jury found in respondent's favor, it also found in effect that defendant had developed the coupe with opera seats complained of before the petitioners originated theirs (No. 1), that respondent did not for the *first* time after its receipt of petitioners' descriptions use petitioners' ideas (No. 2), and that respondent "devised and made and shipped" the coupes complained of prior to February 8, 1934, the date of first notification (No. 3).

Summary of Argument

A. The Brun deposition was properly excluded at the trial because it was not admissible under Rule 26(d) of the Federal Rules of Civil Procedure since it was taken in the same city in which the trial was had, the deponent lived a few miles away, had an office in the city where the trial was had, was subject to subpoena, was available at the trial, and was not a party or an officer, director or managing agent of the respondent corporation. Furthermore, the so-called admission against interest was not in fact so for when deponent said that 1935 was the first year of respondent's prior coupe with opera seats he was testifying only as to the *export* of that coupe by respondent's Overseas Division and not the making and selling of it by the Fleetwood Unit and Cadillac Motor Car Division of respondent.

B. It was not reversible error for the trial court to admit the exhibits with respect to the Derham prior use (question 4) and the prior publications and patent (question 5) for where there is a special verdict, instead of a general one, and separate questions are framed for the jury to answer there is no prejudice if the court allows the introduction of inadmissible evidence as to one or more of those questions where that evidence has nothing to do with the other questions which are controlling.

C. Allowing the juror Johnston, whose wife owned ten shares out of many millions of respondent's capital stock, to sit was not reversible error because (a) petitioners did not make proper objections; (b) he was not disqualified; (c) petitioners waived any objection they may have had to him when they later refused to accept one of the alternate jurors, refused a mistrial and consented to going on with the trial without objection.

D. The rule in the federal courts that an objection to the qualifications of a juror can be waived is controlling for while it is true that the qualifications of a juror are in accordance with the laws of the state wherein the federal court sits, yet the effect upon the verdict of the presence on the jury of one disqualified by the laws of the state to sit as a juror will be determined in the federal courts in accordance with their own views of the law uncontrolled by the decisions of the local courts, and objection to the qualifications of a juror may be waived in the federal courts.

E. Petitioners' argument that they did not have a fair and impartial trial because of "the voluntary and unjustifiable criticism and rebukes by the Trial Court" is wholly without basis and ought not to have been made.

ARGUMENT

Petitioners' Point A

Under Point A on page 16 of their brief, petitioners argue that the Brun deposition containing an alleged admission against interest was erroneously excluded at the trial, that this admission negatived respondent's proof as to findings Nos. 1, 2 and 3 of the jury, *supra*, pp. 1-2, and that thereby petitioners were prejudiced. The same point is reiterated at pages 5, 9, 10 and 15 of the petition and supporting brief.

The argument of petitioners contained on pages 16 and 17 of their brief is that they examined before trial respondent's vice-president, Mooney; that he referred them to Fred K. Brun, an employee of respondent, for information as to when respondent first began the use of the coupe in question; that Brun testified that it was not until 1935 (Pet. 5-6), which was later than petitioners' first disclosure of February 8, 1934; and that it was error to exclude the Brun deposition because "The statements of the third party are admissible in evidence as the admission of the party who referred the inquirer" (Pet. 17).

This point will be argued first as to the correctness of the exclusion and then as to the merits of the so-called admission against interest. With respect to the latter it will be shown that Brun was speaking only *of sales in the overseas or export* division of respondent, and not for the domestic Fleetwood Cadillacs, which respondent proved it had made prior to any date urged by petitioners; furthermore, Brun also deposed that the overseas division *offered* the coupes in question in *1934*, although none were actually exported (Vol. C, 233).

The question posed by petitioners is not one as to whether the statements of a third party are admissible in evidence as the admission of the party who referred the inquirer, but it is one as to the admissibility of the deposition of a witness taken within one hundred miles of where the Court was held* and the witness was available at the trial (*Federal Rules of Civil Procedure*, Rule 26).

In the first place, Brun, who lived in Maplewood, N. J., and had his office in New York City, was available to petitioners if they wanted him to testify at the trial (Vol. A, 320).

Some days before the end of the trial, and before petitioners had finished their opening case, Brun's deposition was ruled out and the Court advised petitioners' attorney to call Brun if he wanted him (Vol. A, 320), but petition-

* The deposition was taken in (Vol. C, 211) and the Court sat in New York City.

ers' counsel refused to call him (Vol. A, 321). A number of days after this, in rebuttal, petitioners again attempted to get Brun's deposition in evidence and it was again rejected on the grounds that Brun was not a managing agent under the rule and besides he was still available for petitioners to call (Vol. A, 939). Petitioners' attorney told the Court that he did not want to subpoena Brun (Vol. A, 939).

That Brun is not a managing agent in the sense of Rule 26 (d) (2) of the Federal Rules of Civil Procedure so that his deposition might be offered in evidence even though he was available is not open to question. Brun was employed by respondent as *supply manager* of respondent's Overseas Operations Division (Vol. C, 212) and he was in charge of the records that are made with respect to the sales and distribution of automobiles *abroad* (Vol. C, 213). Brun was under the control of Mooney (Vol. A, 927) and is a subordinate answerable to him (Vol. A, 928). Mooney is vice-president of respondent and in charge of respondent's Overseas Operations Division (Vol. C, 221; Vol. A, 263).

Moore's Federal Practice, Vol. 2, p. 2490, says with respect to Rule 26 (d) (2):

> "In determining whether the deponent is a 'managing agent' of a corporation for the purpose of an adverse party using his deposition at the trial as evidence of admissions by the corporation, the courts must approach the question pragmatically, somewhat in analogy to its approach to the determination of who is a 'managing agent' for the purpose of receiving service of process as provided in Rule 4 (d) (3)."

For service of process the agent must at least be in charge of the business. *Shelton* v. *Schwartz et al.* (C. C. A. 7), 131 F. (2d) 805, 808. Brun was not in charge of even respondent's Overseas business.

The admission against interest which Brun is supposed to have made is set forth on pages 5 and 6 of the petition.

These emasculated quotations seem to set forth that respondent did not have opera seats in its coupes until 1935. Immediately after the answer, "in 1935", as quoted on page 5 of petitioners' brief, there is the following which petitioners omitted without showing in their petition that there was any omission:

> "Q. The month? A. I have not the month. The 1935 model year.
>
> "By Mr. Cooper: Was the answer to those questions taken from *an export record?*
>
> "The Witness: Strictly" (Vol. C, 215-6—emphasis supplied),

and again two questions and answers later:

> "By Mr. Cooper: Are you giving this information from your export records or from your own recollection?
>
> "The Witness: No, I am giving this information from *export* records" (Vol. C, 216—emphasis supplied).

It is perfectly apparent that Brun was speaking of records of the *exportation* of defendant's cars, as shown by the above quotation and that as follows:

> "Q. Do you happen to know in what years the #5835* and #5876 were used? A. No, I have no record of that here.
>
> "Q. Does that mean that there were no such cars? A. No, we did not export any" (Vol. C, 221).

---

* The numbers 5635, 5735 and 5835 designated a convertible coupe, the first being for an 8-cylinder Cadillac, the second for a 12-cylinder Cadillac, and the last for a 16-cylinder Cadillac (Vol. A, 396-7). The numbers 5676, 5776 and 5876 designate respectively 8, 12 and 16-cylinder Cadillacs of the solid roof coupe type (Vol. A, 397). Both the solid top and the convertible coupes of all six numbers above designated had opera or auxiliary seats in them just back of the driver's seat and did not have any rumble seats (Vol. A, 398-9). The solid top bodies for the 8, 12 and 16-cylinder engines were the same in every respect; the same was true as to the convertible top coupe bodies (Vol. A, 399). These are the types of coupes which respondent proved to be prior to petitioners'.

Near the end of Brun's examination he was asked to produce records of the Overseas Operations showing the price at which coupes and roadsters might be purchased (Vol. C, 228) for the years 1934-9 (Vol. C, 229). Thereafter such records were produced showing that *in 1934* none of the Cadillac style 5635, 5735, 5835, 5676, 5776, 5876 (all being opera-seat coupes) were shipped (Vol. C, 233), but that *they were offered for sale abroad by the export department in that year* (Vol. C, 234).

We submit that the exclusion of the Brun deposition, which is set forth in full (Vol. C, 211-34) and not in hand-picked form as in the petition (pp. 5, 6), and in petitioners' appendix in the Court of Appeals as found at pages 966-71 of Vol. A, was correct since he was not an officer or managing agent and was available at the trial. Furthermore the so-called "admission" that defendant never began to build such cars until 1935 does not and never did exist.

Not only did the exclusion of the Brun deposition not prejudice petitioners and not negative the "Jury's findings 1, 2 and 3 to the effect that respondent's use of opera-seated coupes occurred prior to 1934", as argued by petitioner on pages 6 and 15 of the petition, but it did not corroborate "the testimony of respondent's assistant chief body engineer that the first opera-seated coupes were manufactured by respondent in 1935", as set forth on pages 6, 7 and 18 of the petition.

"Respondent's chief body engineer", the witness Grebe, who was called on behalf of petitioners, was not the chief body engineer of respondent nor of its Fleetwood unit nor of Cadillac division, which respondent proved were the divisions which produced the early opera-seated coupes, but he was assistant chief body engineer of the Fisher Body Division, concerning which respondent offered no proof whatsoever, except that that division of respondent did not take up the opera-seated coupes until 1935 (Vol. A, 709).

The pages of the record, namely Vol. A, pp. 700, 702 and 709, relied on by petitioners to support their statement

quoted above to the effect that it was not until 1935 that respondent first manufactured opera-seated coupes, is another example of a partial quotation from which an incorrect inference is drawn.

The facts regarding Grebe, "respondent's assistant chief engineer" are as follows: It is true that petitioners' witness Grebe, who was employed by the Fisher Body Division of defendant (Vol. A, 699) as assistant chief body engineer (Vol. A, 700), testified that 1935 was the first year that coupes containing the bodies complained of were built (Vol. A, 702). However, Grebe was a *Fisher** Body Division engineer (Vol. A, 699) and was testifying only about *Fisher Body* and not Fleetwood or Cadillac, and when asked a question concerning Fleetwood he replied: "I have no connection with Fleetwood so I am not competent to testify" (Vol. A, 706).

His further testimony is:

> "Q. Have you anything to do or did you ever have anything to do with the Fleetwood unit of the Fisher Body Division of General Motors? A. Oh, there has been some contact with Fleetwood, but I am not connected with the Fleetwood part of the business.
>
> * * * * * *
>
> "Q. I ask you when, so far as you know, was the first opera-seated convertible coupe made and sold by General Motors? A. The first opera-seated coupe was made by General Motors, *as far as Fisher Body was concerned*, in 1934—pardon me. In 1935, I should say.
>
> "Q. So far as Fisher Body was concerned? A. Yes.
>
> "Q. What was done in Fleetwood you were not acquainted with?
>
> "Mr. Cowen: Just a minute. I object. He said he is not acquainted with that.
>
> "The Court: He is asking him.

---

* The Fisher Body, Fleetwood, Cadillac, etc., are separate divisions or units of defendant, each with its own factory, and of very large size.

"Mr. Cowen: I thought he said he is not acquainted.

"The Court: That is what he is asking.

"A. I did see the trim——

"Mr. Cowen: I would like to have the answer first.

"The Court: He is answering.

"Mr. Cooper: I am the one to object if he doesn't answer my question.

"Mr. Cowen: What is he being asked, your Honor?

"The Court: Let him answer the question.

"Mr. Cowen: I object to the question.

"The Court: Overruled.

"The Witness: *I did see the trim buck of the custom built convertible coupe.*

"The Court: When?

"The Witness: *That was in the fall of 1933,* I believe.

"Mr. Cowen: I move to strike out his answer, because of his previous statement that he knows nothing about Fleetwood.

"The Court: Denied.

"*By Mr. Cooper.*

"Q. I show you Exhibits L-1 to L-6 and ask you to examine them and state if you know what they show? A. These pictures are all what we call trim bucks of a convertible coupe with opera seats.

"Q. Is that the trim buck you said you saw? A. Yes, sir.

"Q. When was it that you saw it? A. Late in 1933" (Vol. A, 708-10—emphasis supplied).*

Respondent never has asserted and did not introduce evidence that the *Fisher Body* Division did anything with respect to this structure prior to petitioners' first letter. The proofs about its prior knowledge and use were confined to *Fleetwood* Custom Bodies on expensive Cadillacs.

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* L-1 to L-6 (Vol. C, 236-41, offered in evid. Vol. A, 360—rec'd 362) are photographs of a trial model or "trim buck" of respondent's coupe which were taken in the Fall of 1933 (Vol. A, 361) and showed a structure similar to respondent's early coupes.

From the above it is clear that petitioners' attorney is misusing the citation to Vol. A, pp. 700, 702 and 709, when he cites it to support his assertion that defendant did not build coupes containing the arrangement in question until 1935.

Petitioners' Point B

Petitioners' Point B, as set forth on pages 18 *et seq.*, 7, 9, 10 and 15 of the petition to the effect that the jury's findings 4 and 5 being irrelevant and legally insufficient on the issues in this case, Respondent's Exhibits A6-A16 and A18-A22 were improperly received in evidence and prejudiced the jury against the merits of petitioners' case, is without merit. Exhibits A6-A16 are those which went to the Derham prior use and, together with testimony, were the basis of finding 4 *supra;* Exhibits A18-A22 are prior publications and one patent which were the basis of finding 5. Both of these findings by the jury were in respondent's favor.

Whether or not these findings were defenses to this action, the fact remains that findings 1, 2 and 3 were in respondent's favor and are controlling of the case, as the Circuit Court of Appeals found.* Petitioners state that they "were seriously prejudiced by receipt in evidence of immaterial and irrelevant exhibits (A6-A16 and A18-A22)" (Pet. 4—substantially repeated, Pet. 7, 9, 10, 15 and 18-20), but the best they argue is that "The jury was undoubtedly influenced by these immaterial and irrelevant exhibits, for their importance on the issue of originality was greatly stressed by respondent's counsel and by the Trial Court" (Pet. 7).

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* "But a judgment for the defendant [respondent] was required by reason of the answers to the first three questions so that the answers to the 4th and 5th are quite irrelevant. * * * That the plaintiffs [petitioners] made no original disclosure to defendant [respondent] the verdict of the jury in answer to questions 1, 2 and 3 plainly establishes" (Vol. C, p. 6, following p. 209).

That petitioners do not point out or argue, beyond the mere statement, any prejudice is not surprising for this is not a case where there has been a *general* verdict and immaterial and irrelevant matter has been admitted at the trial. In that case the jury's verdict may very well have been founded on such evidence. In the instant case, however, there was a *special* verdict in which the jury answered five specific questions and it can be ascertained exactly on what grounds the jury based its verdict. To say that the jury was swayed in its findings that respondent had the coupes complained of not only before the petitioners' first submission of their idea but before the petitioners originated it, by the introduction of evidence of the prior use by a third party and by the introduction of prior publications and patent, is too tenuous to require discussion.

The admission of such evidence, if error, is not in any way prejudicial but merely harmless, and as such was properly ignored by the Court of Appeals in the following language:

> "The plaintiffs [petitioners] object to the admission of some of the exhibits and to the exclusion of others, *but these exhibits had no bearing on the answers to questions 1, 2 and 3*" (Vol. C, p. 6, following p. 299—emphasis supplied).

In other words, if the answers to questions 4 and 5 had been in the negative, the verdict would have been in respondent's favor, in view of the answers to questions 1, 2 and 3.

Where there is a special verdict and separate questions are framed for the jury to answer, it is not reversible error if the Court allows the introduction of inadmissible evidence as to one of those questions where that evidence has nothing to do with the other questions which are controlling:

> *Matter of Kindberg*, 207 N. Y. 220.
> *Petrie* v. *Petrie*, 126 N. Y. 683.

Petitioners' Point C

Petitioners' Point C is that the juror Johnston, whose wife was a stockholder in respondent, was not indifferent, and was therefore an incompetent juror and should have been excluded on petitioners' objection to him (Pet. 20—also 7-8, 9, 10, 14 and 15):

The Court of Appeals held that the petitioners had waived their objection, saying:

> "The belated attempt to obtain a reversal because the wife of Juror No. 1 was the holder of ten shares of stock of General Motors deserves little consideration" (p. 7, Vol. C, following p. 299).
>
> * * * * * * *
>
> "The record shows not only various offers to counsel to substitute an alternate for Juror No. 1, which would have cured any prior error in this connection, but also shows a waiver of the objection by plaintiffs' counsel when he failed to answer the judge's question as to whether he wished a mistrial or a substitution of an *alternate* juror and made no objection to going on with the trial" (p. 9, Vol. C, following page 299—emphasis supplied).

The trial court, at the beginning, had sworn two alternate jurors, so as to provide for the contingencies of the trial.

Petitioners' argument (Pet. 8) that the statement by the Court of Appeals "that petitioners' objection to said juror #1 constitutes a 'belated attempt to obtain a reversal' is unwarranted and certainly not supported by the record" is not in accord with the facts. The Court of Appeals set forth the facts upon which its conclusions, quoted above, were based (pp. 7-9, Vol. C, following p. 299) and there is ample support in the record.

The Court of Appeals held that if juror No. 1 was disqualified, which they did not suggest (p. 7, Vol. C, follow-

ing p. 299), any prejudice could have been cured by the substitution of "one of the alternate jurors who had heard all the testimony", and said:

> "Rule 47(b) of the Federal Rules of Civil Procedure, which governs the use of alternate Jurors, reads:
>
> "'* * * Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. * * *.'
>
> "We can see no reason for construing the above clause of Rule 47(b) narrowly and thus burdening the parties and the court with new trials caused by granting motions to withdraw a juror who is found to be incompetent to serve. The words 'jurors who * * * become unable or disqualified to perform their duties' certainly cover an ineligibility on the part of a juror that is first discovered after the trial has begun. We think that they also include an incompetence of a juror first held to exist because of a changed ruling by the trial judge during the progress of the trial. But the offer, on the sixth day of the trial, to cure the alleged erroneous ruling was not all. Two days later, when an alternate was substituted because of the absence of Juror No. 10, the court asked plaintiffs' counsel whether he wanted a juror withdrawn and a mistrial declared. After an interminable colloquy from which it is apparent that plaintiffs' counsel wished to go on with the trial and retain the chance of succeeding before the jury, while at the same time preserving his objection to the ruling of the court, he at first consented to have the trial continue (f. 776, Plaintiffs' Appendix) * with the substitution of an alternate juror in place of Juror No. 1 and another in the place of Juror No. 10, who was unable to continue as a juror, but later withdrew his consent to the substitution of a juror in place of No. 1 without asking for a discharge of the panel. The following occurred:

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* Vol. A, 259.

"'Mr. Cowen: I just want to say that I think it would be more sensible, according to my view of the case, if we just fill the place of juror No. 10 and leave the jury as it is, with one other alternate, so that in the event something should happen to another juror at least we will have another alternate.

"'The Court: Will that be agreeable to you?

"'Mr. Cooper: Yes, your Honor.

"'The Court: That means we simply fill the post of Mrs. Trank. All right, call the jury back.

"'(The jury returned to the courtroom.)

"'The Court: Mrs. Trank's husband is ill. By consent of the attorneys I am excusing her and substituting one of the alternates.' (Record pp. 260-261.*)" (pp. 7, 8, Vol. C, following p. 299).

The question of the competency of this juror, whose wife owned 10 shares of General Motors stock (Vol. A, 103), was raised three times during the trial and was made the basis for petitioners' motion for a new trial. The places in the record where the colloquy may be found are as follows: Vol. A, 103-4, 132-4, 244-61. The motion for new trial on that ground, supplementary motion for same, the opinion of Judge Moscowitz denying the same, the uncontroverted affidavit of counsel for respondent, the pertinent parts of the record which were incorporated in said opinion, and the order denying the motions are in the record (Vol. C, 153-94, and Vol. A, 975).

After petitioners had used their three peremptory challenges (Vol. A, 98, 103—see also affidavit of counsel for respondent in opposition to petitioners' motions for a new trial [Vol. C, 157-63] and Judge Moscowitz's opinion thereon [Vol. C, 165-6])—the following took place with respect to Johnston, the juror in question:

"(Juror excused, and new prospective juror called.)

"The Court: Were you able to hear the questions I asked of the other jurors?

---

* Vol. A, 260-1.

"The Juror: Yes.
"The Court: Are your answers the same?
"The Juror: My wife has 10 shares of General Motors stock.
"The Court: Well, will that affect your judgment?
"The Juror: I don't believe so.
"The Court: Will it?
"The Juror: No.
"The Court: You are the only one who can decide that. There isn't another person in the world who can say that.
"The Juror: No, sir, there isn't.
"Mr. Cowen: I respectfully ask that he be excused. I have no doubt that he is representing what is in his mind, but I still ask that the Court excuse him.
"The Court: That is not a challenge at all.* Do you feel that you could serve?
"The Juror: Yes, sir.
"Mr. Cooper: Jury satisfactory.
"(The jury of 12 was sworn.)" (Vol. A, 103-4).

Several days later petitioners moved for the withdrawal of a juror because of the alleged incompetency of juror No. 1. At that time the Court said that he would substitute one of the two alternate jurors who had been drawn for that one if it were on consent. Respondent consented but petitioners would not (Vol. A, 133); so the Court denied the motion and called the jury in (Vol. A, 134).

Two days later, and on Wednesday, November 10, 1943, juror No. 10, Mrs. Trank, was absent and upon the Court's suggestion both sides agreed to fill her place by one of the alternates (Vol. A, 244). At that point the Court again raised the question of juror No. 1, Johnston, and wished to know if the petitioners wished a juror withdrawn (Vol. A, 244). From that page to Vol. A, 261,

* The Court of Appeals said: "In the first place, plaintiffs' attorney did not in terms challenge Juror No. 1, for, when the judge said to him that his request that the juror be excused was not a challenge, he took no further action" (p. 7, Vol. C, following p. 299). That Court did not, however, base its opinion on that technical ground, as can be seen from the next few lines.

petitioners' attorney wrangled and fenced with the Court. Then it was suggested, and agreed to by both parties, that both alternates be substituted, one for juror No. 10, Mrs. Trank, who was absent, and the other for Johnston, juror No. 1 (Vol. A, 259). The jury was then called in (Vol. A, 259) but petitioners' attorney began to hedge on his consent, so the jury stepped out (Vol. A, 260). Immediately after that the following took place:

> "The Court: All right. Now you can make your statement.
>
> "Mr. Cowen: I just want to say that I *think it would be more sensible, according to my view of the case, if we just fill the place of juror No. 10 and leave the jury as it is,* with one other alternate, so that in the event something should happen to another juror at least we will have another alternate.
>
> "The Court: Will that be agreeable to you?
>
> "Mr. Cooper: Yes, your Honor.
>
> "The Court: That means we simply fill the post of Mrs. Trank. All right, call the jury back.
>
> "(The jury returned to the courtroom.)
>
> "The Court: Mrs. Trank's husband is ill. By consent of the attorneys I am excusing her and substituting one of the two alternates.
>
> "(To the clerk) Will you draw the name from the wheel?
>
> "The Clerk: Simpson Levor.
>
> "The Court: All right, now we shall proceed" (Vol. A, 260-1—emphasis supplied).

Manifestly petitioners acquiesced with respect to juror No. 1, and the trial proceeded on that basis.

The law is clear that the incompetency or disqualification of a juror may be waived or consented to. *Queenan* v. *Oklahoma,* 190 U. S. 548; *Spivey* v. *United States* (C. C. A. 5), 109 F. (2d) 181, cert. den. 310 U. S. 631; *Strang* v. *United States* (C. C. A. 5), 45 F. (2d) 1006, cert. den. 293 U. S. 835; *Strang* v. *United States* (C. C. A. 5), 53 F. (2d) 820; *United States* v. *Smith* (D. C. Ore.), Fed. Cas. No. 16,341, 27 Fed. Cas. 1175.

Respondent's further position is that, because juror No. 1's wife owned 10 shares of stock of the respondent corporation, that fact did not disqualify him when he stated it would not affect his judgment (Vol. A, 103-4). The decisions are uniform in holding that the question of the qualifications of jurors is peculiarly a matter for the determination of the trial court and that it is of necessity vested with a large discretion and its judgment in that respect will not be disturbed except for an abuse of that discretion. *Reynolds* v. *United States*, 98 U. S. 145, 147, 156; *Union Electric Light & Power Co.* v. *Snyder Estate Co. et al.* (C. C. A. 8), 65 F. (2d) 297, 301; *Remus* v. *United States* (C. C. A. 6), 291 Fed. 501, cert. den. 263 U. S. 717; *Hopt* v. *Utah*, 120 U. S. 430; *Texas & Pacific Railway Co.* v. *Hill*, 237 U. S. 208.

Petitioners' Point D

Under Point D petitioners argue:

> "After juror Johnston was duly sworn a member of the Jury, challenges to him could no longer be made and those previously made could not be waived" (Pet. 22).

In support of this argument petitioners quote from the ancient case of *Hathaway* v. *Helmer* (New York, 1857), 25 Barb. 29, and cite from two old Federal cases. These will be discussed seriatim.

In *Hathaway* v. *Helmer, supra*, it appears from the quoted portion (Pet. 22) that the defendant challenged one of the jurors, which challenge was overruled. Thereafter the judge asked the parties if they had any objection to the jury and both replied they had not. It is this statement that plaintiff claimed was a waiver, but the appellate court stated that it "only meant that he then had no legal objection that he could make or desired to make to any of the jurors". It is apparent that the defendant made no waiver of his former challenge for he was neither given

the opportunity nor requested to waive impropriety in the selection of a juror. Such is not the fact in the case at bar for the trial judge repeatedly asked petitioners' counsel whether he wanted a mistrial because of his objection to juror No. 1 or the substitution of one of the alternate jurors for him. It was at the end of this aggravating colloquy that petitioners' counsel finally consented to go on with the jury as it was then constituted, only substituting one of the two alternates for another juror whose husband was ill (Vol. A, 260-1).

Another case, *United States* v. *Peaco* (D. C. D. of C.), Fed. Cas. 16,018, cited to support petitioners' proposition that an objection to a juryman, once made, cannot be waived, not only is distinguishable but is directly contrary to petitioners' position. In that case defendants moved in arrest of judgment because one of the petit jurors who sat upon the trial had been summoned and served as a petit juror at the next preceding term, contrary to the Maryland law. The Court held, in overruling the motion in arrest of judgment, near the end of its opinion:

> "It constitutes no valid exception to the qualification of the juror; and if it did, it is too late to take it after the juror is sworn."

The third and last case cited by the petitioners is *United States* v. *Watkins* (C. C. D. of C.), Fed. Cas. 16,649 (3 Cranch., CC 441), is not in point for it merely holds as to jurors: (1) that it is no legal objection to a juror that he had been one of a jury in another cause against the same defendant for a different offense; (2) that after a juror is sworn he cannot be challenged and the Court cannot discharge him without the consent of the parties, although he should state to the Court matters which would be proper evidence upon a challenge for favor; and (3) when a tales is returned the parties have a right to challenge any of the original panel already sworn in chief, but it must be for a cause arising after the juror was sworn.

While the qualifications required of jurors by the law of any state have been adopted for federal court trials in such state (28 U. S. C. A., Sec. 411), yet after the jury is selected the trial proceeds

> "* * * under the rules and practices prevailing in the federal rather than in the state courts, and * * * the effect upon the verdict of the presence on the jury of one disqualified by the laws of the state to sit as a juror will be determined in the federal courts in accordance with their own views of the law uncontrolled by the decisions of the local courts." *Roush* v. *United States* (C. C. A. 5), 47 F. (2d) 444, at 445.

That the waiver in the instant case is effective in the federal courts, regardless of the New York State rulings, is made abundantly clear by the following case:

> *Strang* v. *United States* (C. C. A. 5), 45 F. (2d) 1006, cert. den. 283 U. S. 835.

Strang was convicted of using the mails to defraud. On appeal he assigned as error the refusal of the Court to set the verdict aside on the ground that prior to the trial one of the jurors had been convicted of manslaughter. During the trial Strang heard and discussed with his counsel a rumor that the juror in question had been convicted of a felony. A detective was sent and obtained a certified copy of the judgment of conviction and returned and could have delivered it to Strang while the Court was charging the jury; but he kept it and delivered it to Strang after the jury retired, but before they returned with their verdict. In affirming the conviction the appellate court said:

> "The qualifications required of jurors by the law of any state have been adopted for federal court trials in such state. 28 USCA § 411. Conviction of a felony, such as manslaughter, is a ground of challenge of a juror for cause. Article 616, Texas Code of Criminal Procedure. A challenge for cause in Texas is there-

fore not an absolute disqualification, but confers upon a defendant a privilege which he may waive.

* * * * * *

"But it was not too late to present to the court evidence which came into his physical possession and of which admittedly he had actual knowledge after the jury had retired but before they had returned into court with a verdict. Upon the showing made after verdict, the conclusion is inescapable that appellant was speculating on his chances of being acquitted, intending to rely on the disqualification of the juror only in the event he was convicted. He could not do this, but must be held to have waived the ground of challenge for cause based on the disqualification of the juror. Queenan v. Oklahoma, 190 U. S. 548, 23 S. Ct. 762, 47 L. Ed. 1175. See, also, Bush v. United States (C. C. A.), 16 F. (2d) 709" (pp. 1006-7).

After Strang's petition in the above case for a writ of certiorari had been denied (283 U. S. 835) he applied to the Court of Appeals for leave to file in the District Court a petition for writ of error *coram nobis*, the disposition of which is found in the following case:

Strang v. *United States* (C. C. A. 5), 53 F. (2d) 820, 821.

The grounds of the petition for a writ of error *coram nobis* was because of the absolute disqualification of the juror who was an unpardoned convict and because of the discovery of certain documents which had been lost during the trial. The Court discussed the question of whether the petition was timely, but said "no decision of that question is necessary because the grounds are insufficient to require a new trial if timely urged". In denying the petition the Court said:

"The juror's disqualification we have already held was waived by proceeding with the trial after learning of it. Strang v. United States (C. C. A.), 45 F. (2d) 1006. The point now pressed that the juror's disqualification is not waivable under the Texas law is

without weight in the federal courts. While the qualifications of jurors are by federal statute (28 U. S. C. § 411 [28 USCA § 411]) the same as in the state court, the time and mode of objecting to a disqualification and the effect upon the verdict of participation by a disqualified juror are not governed by state law but by the common law. Roush v. United States (C. C. A.), 47 F. (2d) 444" (p. 821).

See also:

Zito v. *United States* (C. C. A. 7), 64 F. (2d) 772;
United States v. *Rosenstein* (C. C. A. 2), 34 F. (2d) 630, cert. den. 280 U. S. 581;
Davis v. *United States* (C. C. A. 4), 49 F. (2d) 269, cert. den. 283 U. S. 859;
Queenan v. *Oklahoma*, 190 U. S. 548;
Kohl v. *Lehlback*, 160 U. S. 293.

There is no merit to petitioners' Point D.

Point E

In addition to the points which petitioners argue in their petition there is the following statement listed under Specifications of Errors to be relied on:

"4. The voluntary and unjustifiable criticism and rebukes by the Trial Court of petitioners' counsel deprived petitioners of a fair and impartial trial" (Pet. 14).

Nowhere else in the petition or brief is this specification mentioned.

This point was raised by petitioners in the Court of Appeals, which disposed of it in the following language:

"The contention of plaintiffs' counsel that they did not have a fair trial *is wholly without basis and ought not to have been made.* The action of plaintiffs' coun-

sel in insisting on objecting to Juror No. 1, when his grievance could easily have been obviated by the acceptance of an alternate juror, the filing of a groundless affidavit of prejudice (unaccompanied by the affidavit of counsel required by the rule) which he later withdrew, charges against opposing counsel, and charges that the judge himself was partial, though most offensive, were treated by the court with much forbearance. *If there was any prejudice to the plaintiffs it was due to the unseemly antics of their counsel*" (p. 9, Vol. C, following p. 299—emphasis supplied).

Conclusion

We submit that the points sought to be raised are erroneous; that there is no merit in petitioners' contentions; that no valid question is raised under Section 5 of Rule 38 of this Court; and that the petition for writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent.

Dated: New York, N. Y.,
August 3, 1945.